Report on “public consultation on the general conditions for balancing services (T&C FCR, T&C aFRR, T&C mFRR), restoration services (T&C RSP), voltage and reactive power services (T&C VSP), and services related to congestion management (T&C OPA, T&C SA)”

Public Consultation held between 16/09/2019 – 16/10/2019

25/10/2019

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INTRODUCTION

The aim of the consultation on the general conditions for balancing services (T&C FCR, T&C aFRR, T&C mFRR), restoration services (T&C RSP), voltage and reactive power services (T&C VSP), and services related to congestion management (T&C OPA, T&C SA)was to receive feedback of the stakeholders on this document. The consultation was launched on the 16th of September 2019 and ended on the 16th of October 2019. The consulted documents can be found on the website of Elia.

Elia has received individual feedback on the documents from the following stakeholders:

- Febeliec
- Febeg

This consultation report consolidates the received feedback of the stakeholders. Most of the received inputs are requests for clarification or require small adaptations to the documents.

1. General remarks

In this section, the general remarks received on the consultation note are grouped together.

Stakeholder	Feedback of Stakeholder
Febeliec	Febeliec strongly wants to state that it is at this point and with the available information impossible to form a general opinion on the proposed general conditions, without a clear view on the content of all the contracts for which these will be applied. Consultations on the terms and conditions for some of the mentioned services are on-going, yet not for others. Moreover, even for those services where consultations are on-going, the final texts of these terms and conditions are at this point not yet known and could require different general conditions as the one proposed, especially since some of the services mentioned are mandatory to grid users while others are voluntary. Under these current conditions, Febeliec in any case reserves itself the right to come back to the content of the general conditions in any point of time in the future whenever new information becomes available.
Answer of ELIA	
Elia understands the concerns of Febeliec with respect to the separate consultation of different parts of a same contract. However, Elia underlines that: - The process has been discussed with the CREG, as it was agreed that this would guarantee consistency of the general conditions among all the cited T&Cs. - The general conditions are de facto general and can be analysed on their own, especially since the general nature of the services is known so that the interference between the general and specific conditions can be measured.. - A differentiation of the general conditions per T&C is not excluded if the need should be identified. All amendments to the general conditions will be consulted with the stakeholders and follow an approval procedure by the regulator. - A first version of all the T&Cs (except for the T&C VSP) has already been consulted and so a view on the content of the contracts for which these GC will be applied is available.	

Stakeholder	Feedback of Stakeholder
Febeliec	The T&C's nor the contract seem to include a clear order of precedence between the T&C's, Part 1 (General Conditions) and Part 2 (Specific Conditions) of the contract.

Answer of ELIA
Indeed, no order of precedence has been identified as both parts are equal in terms of order as these contracts are now regulated. In the case of a contradiction, an adaptation of the contract needs to be performed.

2. Specific remarks

Stakeholder	Feedback of Stakeholder
Febeliec	reference is made to the definitions used in both federal and regional energy legislation and technical regulations as well as in European energy legislation, although no consistency whatsoever exists between these definitions, resulting in the fact that it will be unclear how a certain term, for which several non-consistent definitions exists, will need to be understood within the framework of the contract;
Answer of ELIA	
The reference to the legal framework aims at definitions that do not need specifications in the context of these contracts. Definitions that apply to this contract and need specifications are listed in the document to avoid any contradiction with existing legislation. Also in the specific conditions, definitions are listed.	

Stakeholder	Feedback of Stakeholder
Febeliec	in the definition of "*Directe Schade*" reference is made both to "*contractbreuk en/of fout*", where only the non-compliance with a contractual obligation seems to be relevant for such contractual liability (see also art. I.6.2);
Answer ELIA	
Elia has adapted the definition as follows: *De schade die ~~direct~~ rechtstreeks en onmiddellijk voortvloeit uit een contractbreuk en/of een fout, bedoeld in artikel I.6.2, van een van de Partijen, met uitsluiting van Indirecte Schade.* As well as article I.6.2: *De Partijen bij dit Contract zullen tegenover elkaar aansprakelijk zijn voor elke schade die het rechtstreekse en onmiddellijke ~~direct~~ gevolg is van een contractuele inbreuk en/of een fout in het kader van of naar aanleiding van de uitvoering van het Contract, op welke grond dan ook (contractueel of buitencontractueel ~~of anderszins~~).*	

Stakeholder	Feedback of Stakeholder
Febeliec	in the definition of "*Indirecte Schade*" reference is made i.a. to "*elke gebeurlijke schade*", "*elk verlies of nadeel*", which is far too wide as it targets any possible damage and not only indirect or consequential damage;

Answer ELIA
Elia has adapted the definition as follows: “Elke onrechtstreekse schade of gevolgschade, elk verlies of nadeel, zoals maar niet beperkt tot verlies van inkomen, gederfde winstens, verlies van gegevens, verlies van zakelijke opportuniteiten, verlies van (toekomstige) cliënten, gemiste besparingen, enz.” This definition is generally accepted and widely used.

Stakeholder	Feedback of Stakeholder
Febeliec	Art. I.2.1. should differ between mandatory and voluntary services;
Answer ELIA	
Article I.2.1 defines the rights and obligations within the context of this contract. For mandatory services – where participation to the service is defined by the legal framework – a contract still needs to be signed and is broader than the legal obligation of participation. Article I.2.1 is therefore applicable in any case.	

Stakeholder	Feedback of Stakeholder
Febeliec	Reference is made several times (e.g. art. I.2.2, art. I.4.1) to possible other/subsequent parts of the contract. It is unclear to Febeliec which other/subsequent parts of the contract Elia has in mind;
Answer ELIA	
Elia takes due note of the comment of Febeliec and has adapted the proposal by clarifying the reference to the **annexes** of the contract.	

Stakeholder	Feedback of Stakeholder
Febeliec	Art. I.4.1: Febeliec wonders whether it would not make sense to add the possibility that the contract will enter into force at another time than once it is signed by the Parties (e.g. “*behoudens indien uitdrukkelijk anders overeengekomen in de Bijzondere Voorwaarden*”);
Answer ELIA	
The contract enters into force on the day of signature. However, entry into force for the provision of the service can be defined in the specific conditions (part II of the contract) of each T&C.	

Stakeholder	Feedback of Stakeholder
Febeliec	Art. I.4.2: It is stated that the term of the contract is mentioned in Part 2 (Specific Conditions) but e.g. no clear term is mentioned in Part 2 of the OPA and SA Contract;
Answer ELIA	
Elia added a clarification of the validity period of the contract in Article II.3.2 of the T&C OPA and SA.	

Stakeholder	Feedback of Stakeholder
Febeliec	The article concerning liabilities (Art. I.6), which does not seem to be well drafted (e.g. Art. I.6.2; the various references to “boetesysteem”, “boetes” although liabilities and penalties are totally different concepts, etc) and is in any event very difficult to validate by lack of content of the specific contracts for which these general conditions will be used (e.g. the specificities concerning caps on compensation which is limited per contract, but which might require a more extensive overhaul in case all balancing services will be bundled in one single contract);
Answer ELIA	
Article I.6.1 confirms indeed that liabilities and penalties are two very distinct concepts. Penalties are indeed defined in other parts of the contract. Elia takes note of the remark of Febeliec concerning the difficulty of assessment and refers to the past and ongoing consultations of the T&C for the specific conditions.	

Stakeholder	Feedback of Stakeholder
Febeliec	The article on emergency and force majeure (Art. I.7) requires according to Febeliec a major overhaul. Febeliec notices that Elia has introduced here the same text that it proposed for the Federal Grid Code Electricity (but which was rejected in the final text), while not having made any modifications taking into account the comments of stakeholders during the process with respect to the Federal Grid Code. Febeliec urges Elia to align at least the section on force majeure with the international standards in this field, instead of creating an Elia definition on the topic, which leads to seemingly arbitrary elements (e.g. the inclusion of a nuclear or chemical explosion and its consequences as force majeure);
Answer ELIA	
The article on force majeure has been drafted and discussed with the CREG. Article I.7.3. confirms that for a situation to be considered as force majeure the conditions defined in	

article 1.7.3,2nd alinea must be met. Therefore, Elia confirms that the section on force majeure is aligned with applicable jurisprudence and legal writings.

Stakeholder	Feedback of Stakeholder
FEBEG	oP.9 "The term "force majeure" shall mean […] [event] which has actually happened" : it should be completed with "or would happen if no measures are taken that prevent the performance of the obligations of the Party under this Contract". oP.10, first bullet : "the impossibility to operate the grid or installations that from a functional point of view are part of it" : it should be completed with "or the facilities of the Service Provider" (reciprocity)
Answer ELIA	
With respect to the first suggestion: it is Elia's understanding that as long as measures can be taken to avoid a 'force majeure', i.e. control over the situation is still possible, the situation cannot be qualified as such. A situation of 'force majeure' can only be qualified as such if the event actually occurs. The suggestion of Febeg would therefore add uncertainty is too wide. With respect to the second suggestion: Elia adapts the proposal following the suggestion of Febeg.	

Stakeholder	Feedback of Stakeholder
Febeliec	Also on the part of confidentiality (Art. I.8) does Febeliec have some reserves, as Elia easily states that it can share such confidential information with "operators of other grids or within the framework of contracts and/or rules with foreign grid operators", which according to Febeliec creates a possibility of misappropriation of confidential information and should, if any, only be possible insofar vital and insofar such information cannot be anonymized. The wording "afgesloten" in Art. I.8.4 is rather confusing and should be replaced by "beëindigd";
Answer ELIA	
This article also states that the information can only be shared '*insofar as the addressee of that information undertakes to accord the same degree of confidentiality to that information as that accorded by Elia*', as well as '*on a "need-to-know" basis, and reference will always be made thereby to the confidential nature of the information*.', covering the concern of Febeliec. Elia also underlines that obligations to share information with other grid operators stem from legal dispositions in the network codes (such as SOGL). The term 'afgesloten' is correct, as in the sense of 'een contract aangaan'. However, after review, the following was deleted: ~~*'or in the event that the Contract is not concluded, after the notification of the confidential information.'*~~	

Stakeholder	Feedback of Stakeholder
Febeliec	On the part of the review of the contract (general and specific conditions) (Art. I.10), Elia refers to the processes foreseen therefore, yet it is unclear to Febeliec which processes would apply in case of these newly regulated contracts. In any case, Febeliec urges Elia to organise public consultations as well as stakeholder workshops whenever such modifications would be envisaged. As a basic principle, in case of an amendment of the contract, the service provider should in any event have the right to terminate the contract (surely if it relates to voluntary services) without the need, at is currently proposed by Elia, to demonstrate that the amendment of the contract has a "beduidende impact" on the contractual balance (too vague and who will assess this?);
Answer ELIA	
Elia refers to the European network codes, as well as to the federal grid code for the description of the amendment procedures for each of the T&Cs, as they define the newly regulated contracts. Elia intends to follow the obligations stated by law. The contractual duration and the termination process are described in the specific conditions of the T&Cs (for example in Annex 1, article 1b of the T&C BSP). In case of review, the Service Provider who does not agree with the amendments may terminate the Contract in case of "significant impact" on the contractual equilibrium. Disputes related to the Contract are finally governed by art I.13.	

Stakeholder	Feedback of Stakeholder
FEBEG	A Hardship clause was included in the precedent GC but is missing in the proposed GC. It should be reintroduced.
Answer ELIA	
Elia refers to the fact that the T&C's are now regulated and to article I.10. Termination of the contract is also defined in the specific conditions of the T&Cs.	

Stakeholder	Feedback of Stakeholder
FEBEG	Art 1.10.1 (p13) Amendments : Entry into force of amendments to the Contract should happen not earlier than 30 days (instead of 15 days) after such notification to the Service Provider.
Answer ELIA	
The term of 15 days is in line with other regulated contracts and marks the end of an amendment procedure, taking into account consultation of the stakeholders and approval by the regulator.	

Stakeholder	Feedback of Stakeholder
Febeliec	Art. I.11: Elia is requested to provide for each contract clear guidance on which faults will be considered to be serious faults possibly resulting in termination of the contract and a claim for compensation of damages;
Answer ELIA	
A serious fault is a commonly used notion in legal documents. A case of serious fault will always be disputed or judged by the competent regulator or court.	

Stakeholder	Feedback of Stakeholder
Febeliec	Febeliec wants to point out that in many instances (presumably in case of use of automatic references) references to articles often contain double use of “Art.”.
Answer ELIA	
Elia thanks Febeliec for the remark and adapts the general conditions as such.	